No. 11929 Criminal.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

SAMUEL D. COLLINS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## REPLY BRIEF OF APPELLEE.

---

JAMES M. CARTER,
*United States Attorney,*
ERNEST A. TOLIN, and
GEORGE M. BRYANT,
*Assistant United States Attorneys,*
600 United States Postoffice and
Courthouse Building, Los Angeles 12,
*Attorneys for United States of America.*



Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

## TOPICAL INDEX

## TABLE OF AUTHORITIES CITED

### Cases



### Statutes

No. 11929 Criminal.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

SAMUEL D. COLLINS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## REPLY BRIEF OF APPELLEE.

---

### I.

### Jurisdictional Statement.

The jurisdiction of this Court is not contested on this appeal.

### II.

### Statement of Facts.

The United States of America on August 11, 1947, applied to the United States District Court for the Southern District of California, Central Division, for a writ of *habeas corpus ad prosequendum*. This writ was granted by the Court and directed to the sheriff of Los Angeles County, directing the said sheriff to produce the appellant before the court upon charges of income tax evasion. On August 11, 1947, and subsequent dates the appellant was produced before the court.

Collins was represented by counsel, Percy Hammond [Tr. 2] and George N. Stahlman [Tr. 5]. Appellant was

very anxious to dispose of the matter and waived indictment by the grand jury and consented that the matter be presented by information [Tr. 2, 3]. No point seems to have been raised in this appeal as to the propriety of such action.

On August 15, 1947, the defendant proposed to plead guilty to the information on file in accordance with his waiver as to those counts charging violation of Section 145(b) of the Internal Revenue Code [Tr. 22 and 23] and entered a plea of not guilty to the counts charged in violation of Section 145(c) of the Internal Revenue Code [Tr. 23]. The Court, prior to taking the plea examined Collins at length. Collins was deaf [Tr. 35] and seemed to have considerable trouble in hearing the Court.

George M. Bryant, the Government attorney, requested on examination to determine the appellant's understanding of a plea [Tr. 6]. Judge Yankwich refused to take the plea until he was convinced that appellant understood the nature of the plea and its possible results [Tr. 6-19]. Collins was convicted upon his plea on August 15, 1947, and was sentenced to spend a period of 18 months in a Federal penitentiary upon Count 1 and the same upon Count 2, sentences to run consecutively. Thereafter Counts 3 and 4 were dismissed [Tr. 39].

On April 26, 1948, Collins filed a motion in the District Court to set aside the judgment and change his plea [R. 13]. This was heard without argument and the motion was ruled on by Judge Yankwich, who dismissed the contentions and denied the motion [R. 19]. On May 3, 1948, appellant filed notice of appeal [R. 21]. It is now prosecuted *in forma pauperis,* pursuant to order of this Court.

## ARGUMENT.

### I.

### The Appellant Was Represented by Counsel.

The appellant was represented by counsel of his own choosing, Percy Hammond and George N. Stahlman [Tr. 2, 5].

All that the Constitution requires is that a defendant should be afforded a fair opportunity to secure counsel of his own choice with the accustomed incidents of consultation and an adequate opportunity of preparation. Rule 44 provides that if the defendant appears in court without counsel, then the Court is to advise him of his right to counsel. (Rule 44 F. R. Crim.)

### II.

### The Plea Was Properly Received.

The plea was properly received. Rule 11, Federal Rules of Criminal Procedure, provides that the Court may refuse to accept a plea of guilty and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. The record is here replete with the time that the trial court took to determine the understanding of the appellant of the nature of the charge and consequences of a plea to the charge.

III.

**The Hearing by the Trial Court Was Adequate.**

The Court properly denied the plaintiff's motion for withdrawal of plea. Rule 32(d), Federal Rules of Criminal Procedure, provides:

> "(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or while imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

> "It is well settled that a motion for leave to withdraw a plea of guilty and to substitute a plea of not guilty is addressed to the sound discretion of the trial court; and further that the exercise of such discretion is reviewable . . ."

*Camarota v. United States,* 6 Cir., 2 F. 2d 650;

*Ward v. United States,* 6 Cir., 116 F. 2d 135;

*United States v. Fox,* 3 Cir., 130 F. 2d 56.

> "The cases uniformly hold that motions to withdraw a plea of guilty should be denied where the plea of guilty was entered either by the defendant or his counsel in his presence, and if the defendant knew and understood what was being done and there were not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of the plea."

*United States v. Colonna,* 142 F. 2d 210;

Title 18, U. S. C. A., Sec. 688.

In *Bergen v. United States* (145 F. 2d 181, 186), the Court states:

> "In the absence of a controlling statute or rule of Court, the granting of denial of a motion to withdraw a plea of guilty is within the discretion of the trial court and is not a matter of right. Kercheval v. United States, 274 U. S. 220, 223, 47 S. Ct. 582, 71 L. Ed. 1009; Gleckman v. United States, 8 Cir., 16 F. 2d 670; Scheff v. United States, 8 Cir., 33 F. 2d 263; Rachel v. United States, 8 Cir., 61 F. 2d 360; Jackson v. United States, 8 Cir., 131 F. 2d 606, 609; Ward v. United States, 6 Cir., 116 F. 2d 135; United States v. Fox, 3 Cir., 130 F. 2d 56, certiorari denied 317 U. S. 666, 63 S. Ct. 74, 87 L. Ed. 535; Tomlinson v. United States, 68 App. D. C. 106, 93 F. 2d 562, 114 A. L. R. 1315, certiorari denied 303 U. S. 646, 58 S. Ct. 645, 82 L. Ed. 1102; Roberto v. United States, 7 Cir., 60 F. 2d 774.
>
> "An abuse of the court's discretion is refusing to allow a withdrawal of a plea of guilty is reversible error, but a mere showing of the denial of the motion is not sufficient. It is necessary that the accused show in support of his motion that the plea of guilty 'should not be allowed to stand against him because of some reason existing when it was entered, but for which he would not have entered the plea, and that reason must amount to a fraud or an imposition upon him, or a misapprehension of his legal right.' (Rachel v. United States, *supra* (61 F. 2d 362). It has been held that the principles on which the motion to withdraw a plea of guilty may be granted or denied remain unchanged by Rule 2(4) of the Rules of Practice and Procedure in Criminal Cases providing that the motion shall be made within ten days after entry of plea and before sentence is imposed. Farnsworth v. Zerbst, 5 Cit., 98 F. 2d 541, 543.

"* * * While the burden is on the accused to show cause for the change of his plea, the court's discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially where the defendant is without the advice of counsel and his motion is seasonably made. And, in any case, the motion should not be denied where it is evident that the ends of justice would best be served by granting it.

"An intelligent and full understanding by the accused of the charge against him is a first requirement of due process. Ammons v. King, 8 Cir., 133 F. 2d 270, 272; Smith v. O'Grady, 312 U. S. 329, 61 S. Ct. 592, 85 L. Ed. 859. On a motion by an accused without counsel for the withdrawal of a plea of guilty on the ground of want of comprehension of the charge, the rights of the accused and the duties upon the trial court are not unlike their respective rights and duties when the question is whether the accused has competently waived his right to the assistance of counsel. 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' Johnson v. Zerbst, 304 U. S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 146 A. L. R. 357. So, while the accused in the present case had the right, without the advice of counsel, to enter a plea of guilty to the

charge against him, it rested upon the trial court, when the application for withdrawal of the plea was seasonably made, to determine whether, in the light of all pertinent evidence, the plea of guilty had been made with intelligence and comprehension. Circumstances important for consideration are the nature of the charge against the accused, his apparent intelligence and ability to fully comprehend the charges against him, the gravity of the offense charged, the timeliness of the motion to withdraw the plea, and the fact that the accused before entering his plea did not have the advice of counsel.

"* * * Moreover, the question here is not the probable guilt of the accused nor what caused him to change his mind, but whether, at the time of the entry of his plea, he had the requisite understanding of the charges against him."

## Summary of Argument.

The facts herein are uncontradicted as stated in appellant's opening brief. The Government agreed that this court has the power to consider this appeal; it believes that the Court in this case adequately and fairly examined the defendant to be sure that he understood the nature and possible effects of his plea. The Court was satisfied from his examination, which constitutes the majority of the evidence contained in the Transcript, that the defendant understood what was happening to him. He even gave additional time for the defendant to confer with his counsel. Upon the whole record, it is submitted that the constitutional rights of the defendant were fully protected and that the hearing before the trial court was adequate.

## Conclusion.

Appellee therefore submits that this court should not vacate the judgment of conviction and thereby allow the appellant at this late date to reopen the trial of a matter where it is possible that witnesses and evidence may be not as easily available as they were at the time of trial and plea.

Dated: At Los Angeles, California, this 22nd day of December, 1948.

Respectfully submitted,

JAMES M. CARTER,
*United States Attorney,*

ERNEST A. TOLIN, and
GEORGE M. BRYANT,
*Assistant United States Attorneys,*

By GEORGE M. BRYANT,
*Assistant United States Attorney,*

*Attorneys for United States of America.*